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No. 618

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Supreme Court of the United States

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Nos. 14,612 and 14,663
CRIMINAL

—o—

FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

—o—

RAY E. FRIEDMAN and AMERICAN PRODUCE COMPANY,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

—o—

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

—o—

PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF

—o—

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STATEMENT OF FACTS

The grand jury for the United States District Court for the Northern District of Iowa, Western Division, re-

turned an indictment under date of March 21, 1952, at Waterloo, Iowa, against the following defendants:

Ray E. Friedman
Matthew Dvorkin
Nathan Dvorkin
Larry Dvorkin
Del Smith
American Produce Company, a Corporation

The indictment is in four Counts against all of the defendants. The first and second Count each charge a conspiracy (18 U. S. C. 371) to make a false, fictitious and fraudulent statement and representation of a matter within the jurisdiction of a department or agency of the United States (18 U. S. C. 1001). The third and fourth Counts each charge the substantive offense of making a false, fictitious and fraudulent statement of a matter within the jurisdiction of a department or agency of the United States (18 U. S. C. 1001). The arraignment was scheduled for March 25, 1952, at which time counsel for the defendants stated he wished more time and the arraignment was continued to March 29, 1952. On March 29, 1952, all defendants entered pleas of not guilty to all counts of the indictment and trial was set for April 18, 1952, and by subsequent order the time of trial was changed to April 21, 1952. The Court was advised on April 16, 1952, that the defendants wished to withdraw their pleas of guilty to certain counts and enter pleas of guilty to such counts. The Court then directed that further proceedings be had on April 22, 1952.

On April 22, 1952, the American Produce Company withdrew its plea of not guilty as to Count III of the indictment and entered a plea of guilty to Count III and thereupon on Motion of the United States Attorney Counts I, II and IV of the indictment were dismissed as to the American Produce Company. On April 22, 1952, the defendants Ray E. Friedman, Matthew Dvorkin, Nathan Dvorkin, Larry Dvorkin, and Del Smith each withdrew his plea of not guilty as to Count II of the indictment and entered a plea of guilty to Count II. Thereupon on motion of the United States Attorneys, Counts I, III and IV were dismissed as to the individual defendants.

The Court on April 22, 1952, imposed the following sentences: The American Produce Company, a fine of $10,000.00; Ray E. Friedman, five years imprisonment and certain costs; Matthew Dvorkin, Nathan Dvorkin, Larry Dvorkin and Del Smith each received a sentence of two years but execution of the sentence was suspended and each of these four defendants was placed on probation for two years.

On April 25, 1952, the defendant Ray E. Friedman made a motion to withdraw the plea of guilty he had entered to Count II of the indictment and to vacate the judgment and sentence upon Count II of the indictment. On April 25, 1952, the defendant American Produce Company likewise made a motion to withdraw the plea of guilty it had entered to Count III of the indictment and to vacate the judgment and sentence upon Count III of the indictment. On April 26, 1952, the motion of the defendants Ray E. Friedman and American Produce Company came on to be heard by the Court and on the same

date the Court denied the motions of the defendants Ray E. Friedman and the American Produce Company to permit them to withdraw their pleas of guilty and to vacate the judgment and sentence previously entered on their pleas of guilty. The appeal to the United States Court of Appeals for the Eighth Circuit from the trial Court's order of April 26, 1952, denying their motions to withdraw their pleas of guilty constitutes the appeal in No. 14612. Pending the appeal the defendant Ray E. Friedman was admitted to bail.

On or about May 17, 1952, the trial Court was advised that a wire recording recently taken disclosed matters of importance in connection with his case. Subsequently and on May 19, 1952, a new motion was made to permit the withdrawal of the plea of guilty on Count II as to the defendant Ray E. Friedman and to permit the withdrawal of the plea of guilty on Count III as to the corporate defendant and as to each defendant to vacate the judgment and sentence as to such count. By order of the Trial Court the time and place of hearing was fixed on July 1, 1952. The Trial Court at the hearing on July 1, 1952, limited the hearing to a consideration of the situation as reflected by the wire recording notwithstanding that the motion made by the defendants was not so limited. Under date of July 5, 1952, the Trial Court denied the motion of the defendants Ray E. Friedman and the American Produce Company to set aside the pleas of guilty and vacate the judgment and sentences in their cases. The appeal to the United States Court of Appeals for the Eighth Circuit from the Trial Court's order of July 5, 1952, denying their motions to withdraw their pleas of guilty constitutes the appeal in No. 14,663.

Said appeal in No. 14,612 and No. 14,663 were duly heard before the United States Court of Appeals for the Eighth Circuit before Sanborn, Johnsen, and Riddick, Circuit Jduges, and on December 31, 1952, Circuit Judge Sanborn handed down the decision of said Court denying said appeal and denying that the appellants were denied due process of law before the United States District Court for the Northern District of Iowa and that said District Court did not abuse its discretion nor did it err in denying the appellants' applications for leave to withdraw their pleas of guilty.

Thereafter the appellants filed a petition for rehearing before the United States Court of Appeals for the Eighth Circuit, which petition for rehearing was denied January 23, 1953, and from the decision of the United States Court of Appeals for the Eighth Circuit denying the appeal of these appellants and denying the petition for rehearing asked by the appellants, these appellants petition the Supreme Court of the United States for writ of certiorari to review the decision and the records in this case from the United States Court of Appeals for the Eighth Circuit.

Basis for the jurisdiction of the Supreme Court of the United States to review the Decree and Judgment of the United States Court of Appeals for the Eighth Circuit.

1. The United States Court of Appeals for the Eighth Circuit rendered in this case a decision in conflict with the majority decisions of the other Circuit Court of Appeals on the matter and matters in question in denying the appeal of the appellants on the basis that the United States

District Court for the Northern Division of Iowa denied these appellants due process fo law by the Court assuming certain facts as true in sentencing the appellants, which assumptions were not true and in that said Court abused its discretion in denying the appellants the right to withdraw their pleas of guilty and vacate judgments and sentence entered thereon.

2. That this action involves the liberty of the appellant Ray E. Friedman and the American Produce Company and is such under Division "a" of Section 240 of the revised rules of the Supreme Court of the United States granting unto said Court the right to require by certiorari that this cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if this cause had been brought there by unrestricted writ of error or appeal.

3. That this remedy by writ of certiorari is the only remedy granted under the revised rules of the Supreme Court of the United States to review the decision in these cases heard before the United States Court of Appeals for the Eighth Circuit.

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THE QUESTIONS PRESENTED

1. **Did the United States Court of Appeals for the Eighth Circuit in Cause No. 14,612 and No. 14,663, appealed to said Court from the United States District Court for the Northern District of Iowa, Western Division, err in refusing to hold that the presiding judge at the original hearing in the United States District Court for the Northern District of Iowa, Western Division, abused his discretion in denying the appellants the right to**

withdraw their pleas of guilty and vacate judgments and sentence entered thereon?

2. Did the United States Court of Appeals for the Eighth Circuit in Cause No. 14,612 and No. 14,663 err in holding that the presiding judge before the United States District Court of the United States for the Northern District of Iowa, Western Division, denied these appellants due process of law by said Trial Court's assumption of certain facts as true in sentencing the appellants, which said assumptions were not true?

—o—

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI

I.

The United States Court of Appeals for the Eighth Circuit abused its discretion in not holding that the Trial Court was in error in denying appellants the right to withdraw their pleas of guilty and vacate judgments and sentences entered thereon.

No claim is made by the appellants that at the time of the entry of their plea, they were not represented by competent counsel. Neither is claim made that any representative of the United States Attorney's office made any agreement with the appellants upon which they relied, nor that the Trial Court misled the appellants at the time of sentence. However, the claim is made that the appellants are innocent of the charge to which a plea of guilty was entered and that notwithstanding whatever explanations were made to them by their own counsel, the

United States Attorney and by the Court, their plea of guilty was based upon a misunderstanding of the facts and a misconception of the seriousness of the offense charged. That the appellant Friedman in his affidavit states that he is not only innocent of the charge but that he has a complete defense to the charges brought against him and the Corporation, American Produce Company. The appellant was viscerating chickens for the United States Army under Army regulations and at the time he entered his plea of guilty for himself and the American Produce Company he firmly believed that he was innocent, and if there had been any violation it was purely technical in nature and was not of a serious nature and would be subject only to a nominal fine and that the best interests of the Corporation and himself would be served by plea of guilty rather than to spend his time and labor in a lengthy litigated trial as his services were more dearly needed at the American Produce Company in viscerating chickens for the Army.

That the petition for writ of certiorari should be allowed to enable the Supreme Court of the United States to review the complete record in this case which will surely show the clear abuse of the Trial Court's discretion in the United States District Court for the Northern District of Iowa, Western Division, in denying these appellants the right to withdraw their pleas of guilty and vacate judgments and sentences entered thereon, and is the only remedy remaining for these appellants to protect their liberty and property, being innocent of the charges involved.

II.

The appellants were denied due process of law by the Trial Court's assumption of certain facts as true in sentencing the appellants, which said assumptions were not true and the United States Court of Appeals for the Eighth Circuit erred in not so holding in its decision.

That prior to the sentencing of these appellants the Trial Court, being the District Court of the United States for the Northern District of Iowa, Western Division, had before it a report from the probation officer and in sentencing the appellants, read to said appellants certain excerpts from said report. That said excerpts so read to the appellants by the Trial Court were entirely false and untrue and based on said report the severity of the sentence imposed on these appellants was rendered by the Trial Court, and these appellants were denied at said time due process of law in being unable to answer and explain and prove the falseness of the probation officer's report and the Trial Court, in assuming the report of the probation officer as true without any proof thereof, denied these appellants due process of law.

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REQUEST FOR ORAL ARGUMENT

The appellants, Ray E. Friedman and the American Produce Company, and their attorney, Marvin A. Miller of Cherokee, Iowa, request this Honorable Court's permission to orally argue the issues involved in this writ of

certiorari when presented and heard by the Supreme Court of the United States.

MARVIN A. MILLER,

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Cherokee, Iowa,

Attorney for Appellants.

SUPPORTING BRIEF OF APPELLANTS

I.

The Trial Court abused its discretion in denying appellants the right to withdraw their pleas of guilty and vacate judgments and sentences entered thereon.

Provision for the withdrawal of a plea of guilty is now embodied in Rule 32 (d) of the new Federal Rules of Criminal Procedure which rule reads as follows:

> "(d) Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

It will be noted that the condition stated in the rule for the setting aside of the judgment of conviction and permitting the plea to be withdrawn is "to correct manifest injustice."

Both before and after Rule 32 (d) the question of when and under what circumstances a plea of guilty might be withdrawn and the judgment of conviction set aside has arisen. A good statement of the rule is found in 22 Corpus Juris Secundum 641:

> "In a proper case the discretion of the Court should be freely exerceised to allow a withdrawal of the plea of guilty, it should be liberally exercised, especially in capital cases, in favor of life and liberty or innocence and liberty and as the law favors a trial on the merits the Court should resolve all doubts and exercise its discretion in favor of such a trial. The

Court may and should permit a plea of guilty to be withdrawn where: It appears that accused as a defense worthy of consideration by a jury, or any reasonable ground for going to the jury is offered evidence of accused's insanity at the time of the offense, or sufficient evidence to raise a doubt as to his sanity at the time of the entry of the plea is introduced; or the plea was made inadvisably or at least when application for withdrawal is duly made in good faith and is sustained by proofs and a proffer is made to go to trial on a plea of not guilty or other valid plea or any reasonable ground is offered for withdrawing the plea and going to the jury. Indeed the withdrawal of the plea of guilty should not be denied in any case where it is in the least evident that the ends of justice will be subserved by permitting not guilty to be pleaded in its place. * * *." "Accused should be permitted to withdraw a plea of guilty which is contrary to the truth or the record of which does not speak the truth. Also the Court should permit the withdrawal of the plea where it appears that there is doubt of the guilt of the accused.

"The Court should permit a plea of guilty to be withdrawn if it fairly appears that accused was in ignorance of his rights and of the consequences of his act or was influenced unduly and improperly by hope or by fear in the making of it or if it appears that the plea was entered under some mistake or misapprehension."

A good statement is likewise found in American Jurisprudence, Vol. 14, page 961 (287):

"As in other cases of discretionary power no general rule can be laid down as to when a defendant will be permitted to withdraw his plea. The decision in each case must depend to a great extent on the particular circumstances. Generally, however, it may be said that the withdrawal of a plea of guilty should

not be denied in any case where it is in the least evident that the ends of justice will be subserved by permitting not guilty to be pleaded in its place. The least surprise or influence causing a defendant to plead guilty when he has any defense at all should be sufficient grounds for permitting a change of plea from guilty to not guilty. Leave should ordinarily be given to withdraw a plea of guilty if it was entered by mistake or under a misconception of the nature of the charge, through a misunderstanding as to its effect; through fear, fraud or official misrepresentation; was made involuntarily for any reason; or even where it was entered inadvisedly, if any reasonable ground is offered for going to the jury. * * *."

Many of the early State and Federal cases are collected in two annotations, the first of which is 20 A. L. R. 1445 and the second is 66 A. L. R. 628.

In *Kercheval v. United States,* 274 U. S. 220, 47 S. Ct. 582, 71 L. Ed. 1009, the Court stated:

"But, on timely application, the court will vacate a plea of guilty shown to have been unfairly obtained or given through ignorance, fear or inadvertence. * * * The court in exercise of its discretion will permit one accused to substitute a plea of not guilty and have a trial if for any reason the granting of the privilege seems fair and just."

In *Roberto v. United States,* 60 F. 2d. 774, 7 C. A. the Court stated at p. 775:

"Such a plea (plea of guilty) necessarily involes an admission of guilt. If such plea is inadvisably made, or is contrary to the truth, the accused should not be held strictly to his plea. He should be, and so far as our observation goes, he is, permitted to change the plea. Likewise, when the

plea is made upon a mistaken assumption of the applicable law (for example, when the statute under which he is indicted is unconstitutional), he should be relieved from the consequences of his plea. The interest of both the public and the accused is promoted thereby."

In *Rachel v. United States*, 61 F. 2d 360, 8 C. A., this Court stated at p. 362:

> " * * * the plea of guilty should not be allowed to stand against him because of some reason existing when it was entered, but for which he would not have entered the plea, and that reason must amount to a fraud or an imposition upon him, or a misapprehension of his legal right."

In *Ward v. United States*, 116 F. 2d 135, 6 C. A., the Court stated at pp. 136-137:

> " * * * it is error to deny leave to withdraw the plea when it was entered because of misunderstanding of its effect or because of misrepresentation."

In *Bergen v. United States*, 145 F. 2d 181 this Court had the same problem as here whether a trial Court had abused its discretion in refusing to permit the appellant and six others to withdraw their plea of guilty to an indictment. This Court reversed the judgment of the District Court and in so doing made this statement at p. 187:

> "We think it may be gathered from all of the cases that an accused is entitled to withdraw a plea of guilty if it fairly appears that he was in ignorance of his right and of the consequence of his act, or if it appears that the plea was made under some mistake or misapprehension. The withdrawal should not be denied where a proper showing for its allowance is made, merely because the defendant on a trial might or probably would be found guilty. While the burden

is on the accused to show cause for the change of his plea, the Court's discretion should be exercised liberally, so as to promote the ends of justice and to safeguard the life and liberty of the accused, especially where the defendant is without the advice of counsel and his motion is seasonably made. And, in any case, the motion should not be denied when it is evident that the ends of justice would best be served by granting it."

In *Williams v. United States*, 192 F. 2d 39, 5 C. A. the Court stated at pp. 39-40:

"Courts are always diligent to ascertain whether a plea of guilty was freely and understandingly entered. A defendant, however, does not have an absolute right to withdraw a plea of guilty, even though the motion so to do be timely made. Such a motion is addressed to the sound, but reviewable, discretion of the trial court. Where it clearly appears that the guilty plea was entered by the defendant in justifiable ignorance of his rights, or that he did not understand the consequences of his actions, or acted as a result of fear, coercion, or mistake, such circumstances are usually held to justify the granting of such a motion. To constitute a sufficient reason for withdrawal of the plea, however, the circumstances must amount to a fraud or imposition upon the defendant, or a misapprehension of his legal rights. Such a motion should never be denied where the ends of justice would be best served by granting it."

In *United States v. Lias*, 173 F. 2d 685, 4 C. A., the defendant had entered a plea of guilty November 9, 1948, to an indictment charging violations of the Internal Revenue Code. On November 24, 1948, the trial Court imposed a sentence of five years and a fine of $10,000.00. After sentence the defendant filed an affidavit stating he was not guilty and that he had been misled by statements

made by the Trial Court to his attorneys. The Trial Court granted the motion on condition that the defendant waive indictment and stand trial on an information on the charges that had been dismissed along with the charge to which a plea of guilty was entered. The Trial Court filed a memorandum which was as follows:

> "The defendant has sworn to his motion to vacate judgment. He says under oath that he only entered his plea because he believed that he would be put on probation or receive a suspended sentence. If the defendant had that bona fide belief in his mind and if that belief was a controlling factor in causing him to enter a plea of guilty, the court has to take that belief into consideration, irrespective of the kind of information upon which it was founded. In any event, my conscience will not permit me to be a party to sending a man to the penitentiary upon a plea of guilty when he insists that he did not commit the acts constituting guilt. * * * I will * * * vacate the judgment and sentence heretofore pronounced in this case, and permit the defendant to withdraw his plea of guilty and to enter a plea of not guilty. However, I will not do this until the defendant has fulfilled his promise to waive presentment by a Grand Jury of the charges contained in Counts one to four, inclusive, of the indictment in this case, and consented to the filing of informations covering the offenses alleged in those Counts. When this is done, all parties will be placed in the same position that they were in on November 9th, prior to the entry of the guilty plea to Count five. The only thing that the government has lost is a comparatively short time in which a trial might have been held. That trial can still be held. No one will be in a worse condition in this case because of this action, unless it is the defendant himself, the party at whose instance it is being taken."

The United States appealed and the Court of Appeals affirmed the judgment.

No claim is made by the appellants that at the time of the entry of their plea, they were not represented by competent counsel. Neither is claim made that any representative of the United States Attorney's office made any agreement with the appellants upon which reliance is now placed. Neither is any claim made that the trial Court misled the appellants at the time of sentence. However, the claim is made that the appellants are innocent of the charge to which a plea of guilty was entered. It is further the contention of the appellants that notwithstanding whatever explanations were made to them by their own counsel, the United States Attorney, and by the Court, the plea was based upon a misunderstanding of the facts and a misconception of the seriousness of the offense charged. The appellant Friedman has stated in his affidavit that he not only is innocent of the charges but that he believes he has a complete defense to the charges which have been made against him and the corporation.

We are not unmindful of the fact that these appellants in open Court on April 22, 1952, said they were guilty of the offenses upon which the Trial Court imposed sentence. We likewise are not unmindful of the fact that these appellants have subsequently stated with equal solemnity that they are not guilty of the offenses upon which the trial Court imposed sentence. It must be apparent that the determination of whether defendant is guilty or not guilty involves the determination of questions of law that perplex courts and lawyers and questions of fact that confound juries. The mere fact that a

defendant says "guilty" when asked upon arraignment does not always mean that he is guilty any more than a defendant is not guilty who says "not guilty" upon arraignment. At best it is a conclusion that experts may have to ponder upon even though they have all the facts and the law. The Trial Court in this case says in effect, "I have determined you are guilty and I do not care to hear any testimony to the contrary," and accordingly pays no attention to his affidavits or the protestations of innocence on behalf of the appellants by his counsel. All that these appellants ask is that they have opportunity of demonstrating their innocence before a court and jury; they have asked the Trial Court to lend as much credence to their affidavit stating they are innocent as to their unsworn oral statement that they are guilty. The ends of justice are certainly better served if these appellants have the opportunity of offering what evidence they have to prove they are not guilty and then a court and jury can better determine the question of guilty.

The appellants were denied due process of law by the Trial Court's assumptions of certain facts as true in sentencing the appellants, which said assumptions were not true.

The Trial Court indicated at the time of sentence that he had a report from the probation officer and at the time of sentence read from such report. There appeared to be certain charges contained in the probation report which had no relevancy to the charges but worsst of all the report contained charges which were not true. It was not the purpose of counsel at the hearing on July 1, 1952, and neither is it the purpose here to impute any

ill motives to the probation officer. It is stated unequivocally that the probation officer was mistaken in the information which he furnished to the Court and which information was relied upon by the Court in determining the sentence to be imposed as well as in determining to deny the motion of the appellants to withdraw their plea of guilty. The secrecy of the probation officer's report was attempted to be eliminated by the original draft of Rule 32 (c) of the Federal Rules of Criminal Procedure (See Institute Proceedings on Federal Rules of Criminal Procedure, February 15, 1946, p. 221). Where the contents of the probation officer's report are relied upon by the Court to the extent they were here and where the appellants dispute the accuracy of that report it would seem there should be some forum or some opportunity to test the various positions by the taking of the testimony under oath and testing it by means of cross-examination.

In *Townsend v. Burke,* 334 U. S. 736, 92 L. Ed. 1690, 68 S. Ct. 1252 the Trial Court either through misinformation or misreading of the record acted upon certain assumptions concerning the defendant's criminal record which were not true. At the time the defendant did not have counsel and the Court held that the absence of counsel who, if he had been present, may have corrected the Court's mistaken assumptions amounted to a denial of due process.

In *Williams v. New York,* 337 U. S. 241, 93 L. Ed. 1337, 69 S. Ct. 1079, the Trial Court sentenced the defendant to death upon conviction of first degree murder

after the jury had recommended life imprisonment. The Trial Court in imposing the death sentence acted upon information which could not have been properly brought to the attention of the jury. The accuracy of the information used by the Court was not challenged by the defendant or his counsel. The Court held that this did not constitute a denial of due process.

These two cases certainly point up the necessity of the Trial Court's disposing of a case on the basis of accurate information. In Townsend v. Burke the basis of the reversal was the Trial Court's erroneous assumption of certain facts as true. In Williams v. New York it was pointed out that no claim was made that the facts taken into consideration were not correct as evidenced by the following portion from the opinion (page 244):

> "The accuracy of the statements made by the judge as to appellant's background and past practices was not challenged by appellant or his counsel, nor was the judge asked to disregard any of them or to afford appellant a chance to refute or discredit any of them by cross-examination or otherwise."

In the instant case the facts assumed by the Court to be true were not only incorrect but the appellants were deprived of the opportunity of disputing them. Here again the ends of justice and fair play should require an opportunity to meet the accusations made and the failure to afford such opportunity constitutes a denial of due process.

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CONCLUSION AND PRAYER

WHEREFORE, it is respectfully submitted and requested that the Supreme Court of the United States issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit to review the findings of said Court and its rulings thereon denying the appeal of the appellants from the District Court of the United States for the Northern District of Iowa, Western Division, and that at final hearing said writ of certiorari be granted and the appellants be awarded a trial where the issue of their guilt or innocence may be determined.

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AMENDMENT TO PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF

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AMENDMENT TO PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF

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1. The Appellants Ray E. Friedman and American Produce Company were denied due process of law guaranteed to them under Amendment V of the Constitution of the United States by the Trial Court and sentencing Judge Honorable Henry N. Graven of the United States District Court for the Northern Division of Iowa at the time of sentencing.

2. That the sentencing Judge Henry N. Graven exceeded his jurisdiction in sentencing the Appellants, Ray E. Friedman and the American Produce Company, Sioux City, Iowa, on April 22, 1952.

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STATEMENT OF FACT

On April 22, 1952, these appellants appeared before Honorable Henry N. Graven, Judge of the United States District Court for the Northern Division of Iowa, and on said date in open court withdrew their plea of not guilty; the appellant, Ray E. Friedman, withdrew his plea of not guilty to Count II of the indictment and plead guilty to said Count II and to this appellant Counts I, III and IV were dismissed. The appellants, American Produce Company, withdrew their plea of not guilty to Count III of the indictment and instead plead guilty and to this appellant Counts I, II and IV were dismissed.

On said date and immediately following the entry of said pleas of guilty by these appellants, the court did not set a future date for sentence of these appellants, but instead immediately proceeded to sentence these appellants to the maximum sentence provided by law, being a five year imprisonment for the appellant, Ray E. Friedman, and a $10,000.00 fine for the appellant, American Produce Company.

The record before this court shows that the court exceeded its jurisdiction in rendering the sentences upon these appellants in that the court denied these appellants the protection afforded by Amendment V of the United

States Constitution in denying them due process of law for the following reasons, to wit:

1. The sentencing Judge Honorable Henry N. Graven could not, as a matter of law, have known on April 22, 1952, when the appellants appeared before him, what their plea was going to be.

2. Nevertheless, following their plea to the indictment of guilty, the court immediately sentenced said appellants and stated that he had previously familiarized himself with the indictment; the minutes of the testimony before the grand jury; and the report of the probation officer.

3. That said facts show the court was already biased and prejudiced against these appellants on said date and could not be a fair and unbiased Judge in rendering his decision.

4. If said appellants had decided on said date to enter a plea of not guilty and stand trial before the court alone and waive a jury, the court because of its previous investigation would have been disqualified to hear the issues of this case.

5. The court went out of its way to acquire all of the information that the court could acquire prior to this date of April 22, 1952, as presented to the court by the government only thus making the court most partial and prejudiced against the appellants with no opportunity given the appellants to present their side of the case prior to sentencing.

6. It is the duty of the court to be open-minded prior to the entry of a plea of guilty or not guilty and to determine the true facts prior to sentencing after the plea of guilty has been entered and a reasonable opportunity given the court to apprize itself of all of the facts before rendering a sentence.

7. The record before this court shows that the Honorable Henry N. Graven disqualified himself as

an impartial Judge in rendering the sentence on the same date and immediately after the entry of the plea of guilty by these appellants and in doing so denied these appellants due process of law guaranteed by the United States Constitution and in doing so exceeded the court's own jurisdiction in this matter.

———o———

CONCLUSION AND PRAYER

Wherefore, these appellants pray that the court grant the relief asked for in their petition for writ of certiorari and that the amendment thereto be allowed by the court and that the court hear said petition for writ of certiorari and this amendment thereto and at final hearing the same be allowed.

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In the Supreme Court of the United States

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tion for rehearing was denied on January 23, 1953 (R. 207). The petition for a writ of certiorari was filed on February 21, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the District Court abused its discretion in denying petitioners' motion to vacate the sentences and for permission to withdraw their pleas of guilty and stand trial.

2. Whether consideration by the sentencing judge, for the purpose of imposing sentence, of facts gathered by a court investigation denied petitioners due process of law.

RULE INVOLVED

Rule 32, F. R. Crim P., provides in pertinent part:

> (c) Presentence Investigation.
>
> (1) *When Made.* The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.
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> (2) *Report.* The report of the presentence investigation shall contain any prior criminal

record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the Court.

(d) Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

STATEMENT

On March 21, 1952, an indictment in four counts was returned in the Northern District of Iowa charging petitioners and four other individuals with conspiracy to defraud the United States, conspiracy to violate 18 U.S.C. 1001, and two substantive violations of 18 U.S.C. 1001 (R. 1-9). The petitioner American Produce Company was owned by petitioner Friedman, who was also its president (R. 36, 62). The other defendants were employees of the Company (R. 64). It was engaged in the processing of poultry, some of which was furnished to the United States Army under contract (R. 66). The indictment charged that the defendants en-

gaged in a scheme to defraud the Army by misrepresenting the quality and quantity of the poultry furnished it.

On March 25, 1952, the defendants appeared in the District Court for arraignment, accompanied by counsel of their own choice, Mr. Frank Margolin (R. 10). At the request of their counsel, the arraignment was continued to March 29, to give him time to study the charges (R. 11-12). On March 29, each of the defendants, accompanied by the same counsel, entered a plea of not guilty, and the case was set for trial on April 18, 1952 (R. 12-14).

On April 16, 1952, the court was advised that the defendants desired to change their pleas as to certain counts and fixed April 22 as the date for further proceedings (R. 170).

On April 22 the defendants appeared, accompanied by the same counsel, who informed the court that the defendants wished to change their pleas as to part of the indictment (R. 34). The United States Attorney advised the court that, in accordance with an understanding, he would move to dismiss three counts of the indictment as to each defendant, if the corporate defendant would plead guilty to count III and the individual defendants to count II (R. 34). Thereupon the court made the following statement (R. 34-35):

> * * * I will state this, as to the dismissal of these Counts, if there has been any promise,

inducement, or intimation made to you, that has led you to believe, because of such dismissal, what your sentence might or might not be on the remaining Count, you are advised not to enter a plea of guilty as to that, because the defendants and defendants counsel are informed that no one has any authority to act, to speak or intimate for the Court what sentence a defendant might or might not receive. It is the long standing rule of this Court that no one has any right to speak in any way for the Court in these matters—whether it be the United States Attorney, and I have never known that he has ever done so—at least it has never come to my attention—or any member of the Court staff—and then sometimes there are others who might attempt to do so and give defendants information that if you will do such and such a thing that the sentence will be so and so, or defendant's counsel or whoever it might be, if anybody has attempted to hold out to you what your sentences might or might not be, the Court will not accept your plea of guilty. And you are informed that the maximum punishment on Count II is a fine of $10,000 and a sentence to imprisonment for five years—and there is always the possibility that the maximum will be imposed. The Court having thus advised you, if the defendants, or any of them, have been under any belief as to

> what their sentences might or might not be, because of any statements made by any one, they should withdraw their pleas of guilty, and the Court will have you do so now.

The judge then asked each of the defendants individually if he had heard the statement, and each replied in the affirmative (R. 35-36). At that time the United States Attorney stated (R. 36):

> In this connection, I might say, in view of your Honor's statement, I have been urged repeatedly by counsel for defendants to inform them what they might get as to their sentence, but I have steadily informed them that that is a matter solely up to the Court, that that is one matter with which I have absolutely nothing to do. * * * That they will have to take their chances on their sentences whatever it might be. * * * They go into it with their eyes wide open.

Then petitioner Friedman, on behalf of the corporation, changed its plea as to count III to guilty, and each individual defendant likewise changed his plea as to count II (R. 36-37). On the Government's motion the remaining counts were dismissed (R. 37).

The defendants' pleas of guilty were entered pursuant to the advice of their counsel, Mr. Margolin and Mr. John W. Graff, a former United States Attorney (R. 73).

Immediately after the defendants changed their pleas, extensive argument concerning appropriate sentences ensued, during which Mr. Margolin made an able and vigorous argument for light sentences (R. 48-63). At the beginning of his argument, Mr. Margolin stated (R. 48-49):

> * * * I want to state that I have no misgivings as to the manner of the Court passing upon any matters presented to it, and I know that the Court passes sentence only upon the facts as the Court has them. I can say that never have I ever presented a matter to this Court where I have ever had any inclination of what any penalty or sentence might be imposed. That certainly is true in this case. I will admit, however, that I did speak with Mr. Diamond [the United States Attorney] several times in an effort to discuss the facts which I thought would shed light on the entire accusation made against these defendants. He has been kind and has given me ear and time in that respect, but not with any information of what might happen. I do not need to ask this Court to be patient with me, because this Court has always been more than patient with every defendant that has appeared before him and every counsel.

The judge replied (R. 49):

> We have plenty of time because this is a matter of great seriousness to your clients.

> The penalty calls for a possible prison sentence of a rather long term, and you may take all of the time that you wish.

At the conclusion of the argument, the judge stated that, in accordance with the customary practice,[1] an investigator on the Court's staff had made a pre-sentence investigation of the facts of the case to aid the judge in fixing sentence (R. 63). This factual report,[2] he said, revealed that the violations were not mere technical ones, but instead disclosed a "shocking case of a cold, calculated, deliberate scheme and plan, over a long period of time, to defraud the Government to a degree that is most appalling" (R. 64). The judge then stated in detail the facts revealed by the report (R. 65-66). He concluded that petitioner Friedman was the driving force in the scheme and that the other defendant-employees were merely his "stooges" (R. 64, 67). Accordingly, he imposed a five-year prison sentence on petitioner Friedman and a $10,000 fine on petitioner American Produce Company (R. 68). The other defendants were given two-year prison sentences, but execution was suspended and they were placed on probation (R. 171).

Three days later, on April 25, 1952, petitioners,

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[1] See Rule 32(c), F. R. Crim. P., *supra*, pp. 2-3.

[2] This report, as well as the transcript of the testimony before the grand jury, was subsequently made part of the record (R. 121).

represented by new counsel, moved to set aside the sentences imposed on them, for permission to withdraw their pleas of guilty, and for a trial under the entire indictment (R. 69-76), alleging that they were innocent, that they had a defense to the charges, and that they were induced to plead guilty by their counsel, who thought their violations were purely technical, not serious, and "that the most that could be expected would be a reasonable fine" (R. 74). They also moved for modification of the sentences (R. 171).

A lengthy hearing on these motions was held on April 26, 1952 (R. 76-117), at which the transcript of the testimony before the grand jury (R. 113) and the pre-sentence investigation report were introduced (R. 121). Petitioners did not offer any evidence.

The motion was denied. The court found that Friedman's pleas, for himself and for his company, were "voluntarily, knowingly, and understandingly entered in the hope that by a plea of that kind he could escape the possibility of a longer sentence." The judge pointed out that petitioners' claim was simply that their counsel had incorrectly estimated the sentences which he thought they would receive (R. 117-121).

On May 19, 1952, petitioners again sought by motion to set aside the judgment and withdraw their pleas, alleging newly discovered evidence in the form of a recently taken wire recording (R. 123-

128, 172). On July 1, 1952, a hearing was held on this motion, limited to consideration of the situation claimed to have been disclosed by the wire recording (R. 132-169, 172).

This hearing revealed that Sergeant Jesse Tilton was stationed at petitioners' plant as an Army poultry inspector. He and his wife were well acquainted with defendant Matthew Dvorkin and his wife. Mrs. Dvorkin was petitioner Friedman's sister (R. 173). About the middle of May 1952, the Tiltons paid a social visit to the home of the Matthew Dvorkins. The conversation which occurred among the four was recorded. A transcript of the recording, conceded to be substantially correct, was admitted in evidence. From this recording it appeared that Matthew Dvorkin engaged Sergeant Tilton in conversation obviously directed to the end of obtaining derogatory statements about a number of people, but principally one of Tilton's superior officers, Captain Sturtevant. In reply to questions, Tilton said in effect that Captain Sturtevant had instigated and brought about the charges in the instant case because of the animosity and ill will which he held for petitioner Friedman. (R. 166-169, 174.)

This was denied by Captain Sturtevant (R. 158-164), Colonel H. F. Sibert (R. 152-158) and Leo J. Ross, an F.B.I. agent (R. 150-152). Mr. Ross testified that the investigation was instituted by the F.B.I. and was carried on for several months be-

fore any Army personnel had been contacted (R. 150). Petitioners did not present Sergeant Tilton as a witness (R. 174).

The judge concluded that the charges made against Captain Sturtevant and others were false, and denied petitioners' motion (R. 170-175).

On petitioners' appeals, the Eighth Circuit affirmed the orders of the District Court denying the two motions (R. 185-197).

ARGUMENT

1. The basis of petitioners' claim that the District Court abused its discretion in refusing to vacate the sentences and to permit them to withdraw their pleas of guilty is stated in the petition as follows (Pet. 17):

> No claim is made by the appellants that at the time of the entry of their plea, they were not represented by competent counsel. Neither is claim made that any representative of the United States Attorney's office made any agreement with the appellants upon which reliance is now placed. Neither is any claim made that the trial Court misled the appellants at the time of sentence. However, the claim is made that the appellants are innocent of the charge to which a plea of guilty was entered. It is further the contention of the appellants that notwithstanding whatever explanations were made to them by their own counsel, the

> United States Attorney, and by the Court, the plea was based upon a misunderstanding of the facts and a misconception of the seriousness of the offense charged. The appellant Friedman has stated in his affidavit that he not only is innocent of the charges but that he believes he has a complete defense to the charges which have been made against him and the corporation.

Thus, petitioners admit they were not misled in any respect. They also admit that they were represented by competent counsel. They do not even claim that their counsel did not fully explain the situation to them. Indeed, they could not, in view of the statements by the District Court, the United States Attorney and their own counsel in open court at the time they changed their pleas.

Petitioners' claim is that despite the fact that they were fully advised, they nevertheless entertained "a misunderstanding of the facts and a misconception of the seriousness of the offense charged," and that they are in fact innocent.

Of course, it is never possible objectively to determine with complete certitude the mental state or understanding of an individual. Nonetheless the courts are frequently compelled to attempt to make such a determination. It is difficult to imagine circumstances where the objective facts indicating that a defendant fully understood the situation at the time he entered his plea of guilty would be

more convincing than those presented by the record in this case.

Petitioner Friedman, who also entered the plea for his company, the other petitioner, was an intelligent, educated man; his formal education extended to two years of college work (R. 60). He was 38 years of age at the time of the proceedings in question, and he had advanced from poverty until he was the owner of a thriving produce business, which he had built, enjoying a national reputation in the field (R. 59-62). He was a member of the Food and Produce Committee of the National Poultry and Produce Institute and a director of the North Central States Poultry and Egg Institute. The fact that he had been invited to speak at the National Fact Finding Conference on frozen eggs shows that he was recognized as an authority in the poultry field. (R. 62-63.)[3] It is inconceivable that a man of such widespread business experience and obvious mental acuteness could have misunderstood the judge's clear and full warning, joined in by both the United States Attorney and his own counsel, that he was pleading guilty to a serious charge and might receive a severe penalty.

Friedman's claim that he misunderstood the facts is just as incredible. He, more than anyone, knew the true facts concerning the charges of the indictment. Apparently what Friedman means is

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[3] He was also an active leader in several social and religious organizations (R. 62).

that he was unaware that if he pleaded guilty the judge would become familiar with the facts of the case; that he hoped the judge, with only the bare allegations of the indictment before him, would not consider the offense a culpable one, and would impose a light penalty. An expectation that the case will not be so fully aired on a plea of guilty as on trial is undoubtedly a factor which motivates many pleas of guilty; but such hope or expectation is not a misunderstanding of the facts.

As pointed out by the court below (R. 194-195), an application for leave to withdraw a plea of guilty, especially after imposition of sentence, is addressed to the sound discretion of the trial court.[4] Such a plea is not a mere confession of guilt; it is a judicial conviction. *Kercheval* v. *United States,* 274 U. S. 220, 223. And an application to withdraw the plea does not raise the issue of the defendant's guilt, already determined, but rather whether the plea was entered voluntarily, intentionally, understandingly and advisedly.[5]

It is true that facts brought to the court's attention indicating that the defendant is innocent of the charges would shed light on the factual issue of

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[4] *United States* v. *Shneer,* 194 F. 2d 598 (C.A. 3); *Williams* v. *United States,* 192 F. 2d 39 (C.A. 5); *Stidham* v. *United States,* 170 F. 2d 294 (C.A. 8); *United States* v. *Colonna,* 142 F. 2d 210 (C.A. 3); see also Rule 32(d), F. R. Crim. P., *supra,* p. 3.

[5] *Kercheval* v. *United States, supra; United States* v. *Shneer, supra; Williams* v. *United States, supra; Rachel* v. *United States,* 61 F. 2d 360, 362 (C.A. 8).

whether the plea of guilty was voluntarily and understandingly made, and undoubtedly should be given great weight by the trial judge in exercising his discretion. Cf. *Bergen* v. *United States,* 145 F. 2d 181 (C.A. 8). But that is not this case.

Aside from Friedman's own sworn statement that he was innocent, he offered no evidence to that effect. On the other hand, the judge had the sworn testimony of 17 witnesses before the grand jury and the report of a reliable court investigator, all strongly indicating that petitioners were guilty.

The court below was eminently correct in stating (R. 197) that it "is apparent that [petitioners'] pleas were voluntarily, understandingly, and deliberately entered and that it was only their dissatisfaction with the sentences imposed which caused them to apply for leave to withdraw their pleas and to stand trial."

2. Petitioners' second contention is that the District Court's consideration, prior to the imposition of sentence, of information gathered by its probation officer denied them due process of law (Pet. 9, 18-20; Amend. to Pet.).

In *Williams* v. *New York,* 337 U. S. 241, this Court held that it was not deprivation of due process for a state court to impose the death sentence, contrary to the jury's recommendation, based on information gathered by court officials. The Court pointed out that the "sentencing judge may consider such information even though ob-

tained outside the courtroom from persons whom a defendant has not been permitted to confront or cross-examine" (p. 245).

Petitioners attempt to distinguish the instant case by asserting that in *Williams* "no claim was made that the facts taken into consideration were not correct" (Pet. 20). The *Williams* opinion, however, did not state that no claim was made at any time that facts considered by the trial court were incorrect. In fact, it is clear that at least some of the information relied on by the trial judge was mere hearsay and allegations (337 U. S. at 244, 253). What the Court related was that at the time the judge recited the facts upon which he was relying for determination of the sentence (p. 244)—

> The accuracy of the statements made by the judge as to appellant's background and past practices was not challenged by appellant or his counsel, nor was the judge asked to disregard any of them or to afford appellant a chance to refute or discredit any of them by cross-examination or otherwise.

It is abundantly evident, however, from a reading of the entire opinion that this Court did not intend the quoted statement to mean that the sentencing judge must wholly disregard a pre-sentence report in the event the facts contained therein are challenged by the defendant. The only restriction imposed in such event is that the defendant be given a reasonable opportunity to re-

fute or discredit the information contained in the report. Petitioners were adequately presented with such opportunity.

Just prior to imposing sentence, the District Court related in detail the facts upon which he was relying to determine the sentences. Those facts were not then denied or challenged in any respect. Three days later, however, in their first motion to vacate the judgment, petitioners challenged and denied some of these facts. At the hearing on these motions, the pre-sentence report and the transcript of the testimony before the grand jury were introduced in evidence. Although petitioners' counsel argued the motion at great length, he did not offer to refute by evidence any of the facts nor did he request permission to cross-examine the persons who had supplied them. At the conclusion of this hearing, the District Court found that the pre-sentence report did not contain hearsay and rumor, but substantiated facts.[6]

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[6] Petitioners also complain because the judge apparently studied the pre-sentence report before they actually changed their pleas to guilty (Amend. Pet. 3). On April 16, 1952, the judge was informed that the defendants intended to change their pleas, which they subsequently did on April 22, 1952. The judge apparently examined the pre-sentence report in the interim. Petitioners say that had they not changed their pleas, the judge would have been disqualified to preside at their trial. This may be true (see Rule 32(c)(1), *supra*), but they did change their pleas as they had indicated they would, and the assumed situation never arose. As we have shown, the judge could properly examine the pre-sentence report before imposing sentence, which is the question presented here.

CONCLUSION

The decision below is correct. The case presents no conflict of decisions or question of general importance. We respectfully submit that the petition for a writ of certiorari should be denied.

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Acting Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

ROBERT S. ERDAHL,
MURRY LEE RANDALL,
Attorneys.

MARCH, 1953.

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Supreme Court of the United States

OCTOBER TERM, 1952

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REPLY AND SUPPORTING BRIEF OF THE PETITIONERS, RAY E. FRIEDMAN AND AMERICAN PRODUCE COMPANY, PETITIONERS

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> this Court that no one has any right to speak in any way for the Court in these matters—whether it be the United States Attorney, and I have never known that he has ever done so—at least it has never come to my attention—or any member of the Court staff—and then sometimes there are others who might attempt to do so and give defendants information that if you will do such and such a thing that the sentence will be so and so, or defendant's counsel or whoever it might be, if anybody has attempted to hold out to you what your sentences might or might not be, the Court will not accept your plea of guilty. And you are informed that the maximum punishment on Count II is a fine of $10,000 and a sentence to imprisonment for five years—and there is always the possibility that the maximum will be imposed. The Court having thus advised you, if the defendants, or any of them, have been under any belief as to what their sentences might or might not be, because of any statements made by any one, they should withdraw their pleas of guilty, and the Court will have you do so now.

The judge then asked each of the defendants individually if he had heard the statement, and each replied in the affirmative (R. 35-36). At that time the United States Attorney stated (R. 36):

> "In this connection, I might say, in view of Your Honor's statement, I have been urged repeatedly by counsel for defendants to inform them what they might get as to their sentence, but I have steadily informed them that that is a matter solely up to the Court, that that is one matter with which I have absolutely nothing to do. * * * That they will have to take their chances on their sentences whatever it might be. * * * They go into it with their eyes wide open."

Then petitioner Friedman, on behalf of the corporation, changed its plea as to count III to guilty, and each

individual defendant likewise changed his plea as to count II (R. 36-37). On the Government's motion the remaining counts were dismissed (R. 37).

The defendants' pleas of guilty were entered pursuant to the advice of their counsel, Mr. Margolin and Mr. John W. Graff, a former United States Attorney (R. 73).

The court immediately and forthwith proceeds to sentence the defendants Ray E. Friedman and the American Produce Company and proceeds to read from the report of the probation officer as shown by the Record 63-68 without giving the defendants an opportunity to prepare for sentence; to answer the charges in the probation officer's report; and without an opportunity to refute the statements made immediately by the court at the time of sentence which protection and opportunity is guaranteed to these petitioners by Rule 32 of the Federal Rules of Criminal Procedure division (c) section (1). That on April 24, 1952, the petitioners filed a motion to set aside sentence; to withdraw plea of guilty; and for new trial in which the information set forth in the presentence report of the probation officer was controverted and shown to be false, Record 61-76 which motion was overruled by the court. That on May 17, 1952, the petitioners filed another motion to set aside sentence; to withdraw plea of guilty and for new trial, which motion was limited by the court to information disclosed by a wire recording, which motion was also denied by the court, Record 123-128, and attached to said motion was the affidavit of the petitioner Ray E. Friedman as to his innocence.

ARGUMENT

1. The basis of petitioners' claim that the District Court abused its discretion in refusing to vacate the sentence and to permit them to withdraw their pleas of guilty is stated in the petition as follows (petition 17):

> "No claim is made by the appellants that at the time of the entry of their plea they were not represented by competent counsel. Neither is claim made that any representative of the United States Attorney's office made any agreement with the appellants upon which reliance is now placed. Neither is any claim made that the trial court misled the appellants at the time of sentence. However, the claim is made that the appellants are innocent of the charge to which a plea of guilty was entered. It is further the contention of the appellants that notwithstanding whatever explanations were made to them by their own counsel, the United States Attorney, and by the court, the plea was based upon a misunderstanding of the facts and misconception of the seriousness of the offense charged. The appellant Friedman has stated in his affidavit that he not only is innocent of the charges but that he has a complete defense to the charges made against him and the corporation and being innocent of the charges in the indictment the petitioner felt that by pleading guilty a lengthy trial with its inherent expense would be avoided and that the expense to the United States Government be avoided and at most this petitioner could expect to suffer would be a reasonable fine on a mere technicality of law. Record 73-74."

That in the motions of the petitioners to set aside their sentence; to withdraw plea of guilty, and for new trial filed April 24, 1952, and overruled by the court April 26, 1952, and as shown in the Record, pages 77-78, the pe-

titioners further set forth to the court the reason for their plea of guilty.

> "That they were misled as to the true facts in the case, that they were ignorant of their rights, that they were firmly convinced that all they had done, if anything, was to violate a small technicality in not getting a proper disclosure immediately to the representatives of the United States Army who were inspecting their plants at times material hereto and that this plea was entered through fear, fear of the Army, primarily, fear of others, fear of the prosecuting attorney, and upon the recommendation of their counsel at that time that because of their Jewish nationality and because of the fact that their inspector at the plant, the United States Department of Agriculure inspector was a Japanese, that they would be crucified here before that court, and that at a jury hearing, if any member of that jury or in the selection of any member of the jury was in the last World War with a Japanese on the stand here testifying as to the true facts; that (petitioners) would not have a chance and based upon the firm belief that they had committed no serious crime whatsoever Ray Friedman entered this plea of guilty and as a result thereof the supreme penalty of the law was imposed, five years in the penitentiary. Furthermore the defendants state here that the court was grossly misled at the time of sentence by the testimony of witnesses before a grand jury and that the information furnished the court by the representatives of the Army and by disgruntled employees who had previously been fired or laid off * * *."

Under Rule 32 (d) of the new Federal Rules of Criminal Procedure it provides as follows:

> "(d) Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition

of sentence is suspended, but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendants to withdraw a plea."

In the present case at the time of the filing of the first and second motions by the petitioners to withdraw their pleas of guilty and be permitted to stand trial on the issues in this case would not have inconvenienced the court in any respect as said motions were promptly made following sentence and in the interest of justice where the defendants insisted that they were innocent of the charges made against them and were willing to stand trial to all four counts of the indictment and entered their pleas under the mistaken belief as set forth above. The court erred in not permitting them to do so and in support hereof the court's attention is called to the statement found in 22 Corpus Juris Secundum 641:

"In a proper case the discretion of the court should be freely exercised to allow a withdrawal of the plea of guilty, it would be liberally exercised especially in capital cases, in favor of life and liberty of innocence and liberty and as the law favors a trial on the merits the court should resolve all doubts and exercise its discretion in favor of such a trial. The court may and should permit a plea of guilty to be withdrawn where: it appears that the accused has a defense worthy of consideration by jury, or any reasonable ground for going to the jury is offered * * *: or the plea was made inadvisably or at least when application for withdrawal is duly made in good faith * * * and a proffer is made to go to trial on a plea of not guilty or other valid plea or any reasonable ground is offered for withdrawing the plea and going to the jury. Indeed the withdrawal of the plea of guilty should not be denied in any case where it

is in the least evident that the ends of justice would be subserved by permitting not guilty to be pleaded in its place. * * * " "As you should be permitted to withdraw a plea of guilty which is contrary to the truth on the record of which does not speak the truth. Also the court should permit the withdrawal of the plea where it appears that there is doubt of the guilt of the accused. The court should permit a plea of guilty to be withdrawn if it fairly appears that the accused was ignorant of his rights and of the consequences of his act or was influenced unduly and improperly by hope or by fear in the making of it or if it appeared that the plea was entered under some mistake or misapprehension."

In support of this rule I called to the court's attention the following authorities and cases:

American Jurisprudence, Volume 14, Page 961 (287).

Kercheval vs. United States, 274 U. S. 220, 47 S. Ct. 582, 71 L. Ed. 1009.

Roberto vs. United States, 60 F. 2d 774, 7 C. A. 775.

Rachel vs. United States, 61 F. 2d 360, 8 C. A. 362.

Ward vs. United States, 116 F. 2d 135, 6 C. A. 136-137.

Bergen vs. United States, 145 F. 2d 181 at 187.

Williams vs. United States, 192 F. 2d 39, 5 C. A. 39-40.

United States vs. Lias, 173 F. 2d 685, 4 C. A.

2. Rule 32 of the Federal Rules of Criminal Procedure division 1 of section c covering presentence investi-

gation provides that the presentence investigation shall not be submitted to the court or its contents disclosed to anyone until the defendant has plead guilty or has been found guilty. In the instant case on April 16, 1952, the judge was informed that the defendants intended to change their pleas of not guilty heretofore entered to all four counts of the indictment, but no information was furnished the court as to the nature, if any, of the change of plea and on April 22, 1952, the corporate defendants plead guilty to count III of the indictment and the defendant Ray E. Friedman plead guilty to count II of the indictment and as previously stated in this reply the court proceeded immediately forthwith to sentence these defendants to the supreme penalty of the law and in said sentence proceeded to inform these defendants that the court had previously advised himself in great detail as to the contents of the probation officer's report which act upon the part of the court was in violation of law and contrary to section 1 of division c of Rule 32 of the Federal Rules of Criminal Procedure.

The court had no information and could have had no information at that time as to what, if any, plea or change in plea would be made by any of the defendants until such time as their plea was made in open court and in previously advising itself as to the contents of the probation officer's report, defendants were denied due process of law and the court had so biased and prejudiced himself against these defendants that it as a matter of law automatically disqualified him to sit further on the issue in this case.

Said actions upon the part of the court and conduct upon the court's part would so disqualify the court that if the defendants at said time had elected to stand trial to the court alone, the court would no longer be an impartial tribunal, but would have been required to excuse himself from hearing this case since he had studied and read contrary to law the probation officer's report. The law contemplates following the entry of the plea of guilty that the court fix a future day for sentence and during said interval apprise himself of the contents of the probation officer's report and during said interval the defendants are permitted to reconsider their plea and so plead not guilty if they cared to do so; all of which rights were denied them by the court in immediately sentencing said defendants to the supreme penalty which the record in this case shows was based greatly, if not wholly, upon the erroneous facts furnished the court in the probation officer's report.

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CONCLUSION AND PRAYER

Wherefore, these petitioners respectfully pray that the court grant them the relief requested in their petition for writ of certiorari and that the Supreme Court of the United States grant said petition remanding this case for trial on the issues thereof in the United States District Court for the Northern Half of Iowa Western Division and

that their sentence be set aside and they be permitted to withdraw their plea of guilty and to stand trial on all four counts of the indictment.

Respectfully submitted,

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Cherokee, Iowa,
Attorney for Petitioners.

FILED
APR 20 1953
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1952

No. 618

RAY E. FRIEDMAN and AMERICAN PRODUCE COMPANY, PETITIONERS

vs.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to The Supreme Court of the United States from The United States Court of Appeals for the Eighth Circuit

PETITION FOR REHEARING OF PETITIONERS RAY E. FRIEDMAN AND AMERICAN PRODUCE COMPANY

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Cherokee, Iowa,
Attorney for Petitioners.

COCKLE PRINTING CO., LAW BRIEFS, OMAHA

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GROUNDS THEREFOR

1. That the reviewing court being the Supreme Court of the United States was under a misapprehension and a misunderstanding of the facts in the petitioners' theory under their petition for writ of certiorari and reply.

2. That the sentencing court exceeded its jurisdiction; was without jurisdiction; and denied these petitioners due process of law in sentencing said petitioners April 22, 1952, contrary to Section (1) of Division (c) of Rule 32 of the Federal Rules of Criminal Procedure.

3. The sentencing court having examined at length the pre-sentence investigation report as well as the minutes of the grand jury and having determined prior to withdrawal of the plea of not guilty by the defendants and the subsequent plea of guilty, to impose the maximum prison sentence on the defendant, Ray E. Friedman, and the maximum fine on the defendant, American Produce Company, should not have accepted such a plea without some indication to the defendants of the intention of the court to inflict such maximum penalties.

STATEMENT

On April 22, 1952, the petitioners, Ray E. Friedman and American Produce Company entered pleas of guilty; the said Ray E. Friedman pleading guilty to Count II of the indictment and the American Produce Company pleading guilty to Count III of the indictment and on said date the court stated in sentencing the defendants (R63-66):

> "This Court has had, by one of its official staff, an extensive pre-sentence investigation. The investigating officer assembles facts, but makes no recommendations. He merely assembles the information developed by his investigation, and reports the same to the Court.

"In this case, the corporation has pleaded guilty to Count 3. Of course, the corporation as such, what it does, is primarily done by and through those connected with it, so I will not spend much time on it.

"Count II in this case, to which the individual defendants have pleaded guilty, charges the individual defendants with making false representations and statements with respect to poultry which it was supplying to the United States Government for the military and naval forces, by altering the stamps, markings, and labels on shipments. Those things in and of themselves, standing alone, might seem, from various cases in which laws are somewhat similarly violated to be technical violations such as violations of the Pure Food and Drug Act. Under the procedure we follow in Federal Court, before imposing sentence we endeavor to find out all of the facts we can surrounding the nature of the act charged. In this case, a careful pre-sentence investigation was made of the matters involved in the commission of the act charged, because it was considered very important to determine whether the act was one of wilful mislabeling or misbranding as distinguished from merely a technical violation, and what relation the various matters had to the whole plan—all this for the purpose of determining whether the defendants should be given the maximum punishment in such cases provided. If a defendant connected with the commission of an offense receives a lighter punishment than might have been imposed that is such defendant's good fortune. An investigation, therefore, was made of the whole background and everything connected with it, so that the Court could be fully informed. This, not for the purpose of punishing for charges not before it, but to know how to sentence on the particular charge to be dealt with. By such investigation the Court can know whether it is dealing with a technical violation or not.

"It appears that this matter has a much broader implication than just the misbranding or mislabeling of some poultry. To this Court, the whole situation discloses a most shocking case of a cold, calculated, deliberate scheme and plan, over a long period of time, to defraud the Government to a degree that is most appalling. The operations over at this plant were virtually cancerous in character. They seemed to contaminate everybody. The principal defendant, Ray Friedman, not only corrupted his brother-in-law, employees, but also a large number of other employees, both men and women, not related to him; I can forgive a man for going wrong himself, but I find it difficult to overlook somebody who goes out and corrupts others, depriving them of their virtues of honesty and morality for a money profit. In this case, it is apparent that the defendant, Friedman, corrupted his brother-in-laws, together with a rather large number of otherwise law abiding employees who worked for them. The record in this case is one that I hope will never again come before a United States Court. It is apparent, from the start, that it was a cold, calculated, deliberate plan of deliberately committing a fraud against the government of the United States. The things that were done to carry out this fraud, the planning and calculating that were done, are almost without parallel:

"Large pieces of abdominal fat and large necks were thrown into giblet packages.

"Reject birds would 'accidentally' fall or be thrown into army boxes being packaged under the army contracts.

"Scales would vary from one-half to one pound several times a day, by someone moving the balance weights.

"The unwarranted use of extra thicknesses of wrapping paper to wrap the chickens, thereby in-

creasing the weight, and the use of 4 to 6 feet of extra box liners.

"Plant graders grading correctly while inspector is standing by side and would be one or two grades off the moment the inspector moved away.

"Crowding the inspector away from the grading table by placing 'final pinning' operation next to plant grader.

"They had a buzzer, signal system in operation, and would lure the inspector to the restaurant for coffee, and give the buzzer signal when the inspector was returning, so that they might get into clear in their chicken switching operations.

"They would change the grading sections of the table without notice. Instead of 'A' grade birds always going into one bin, they might be going into another bin further away from one moment to next.

"They would move the grading table so that chickens passing overhead would drip on the Army inspector.

"They would encourage employees to converse with inspectors while grading.

"When inspectors were not looking they would take their freezer stamps out of their brief cases, and use the government approval stamp on boxes containing lower than 'A' grade chickens.

"They would allow a large number of graded birds to accumulate, and then pack them rapidly so as to defy observation of grade stencilling.

"Attempt to engage inspectors into conversations or criticism in regard to superior officers. They would do this in the hope of securing an upper hand on the inspection personnel.

"Plant officials would hold back final loads of poultry from freezer in an effort to keep an inspector on duty when the day's operation was over.

"They would deliberately report problems to higher officials without discussing same with local inspectors in an effort to discredit and humiliate local inspection authorities.

"Return broken boxes to car load without correcting faults.

"Refuse Army Inspectors the use of the telephone in private without benefit of company ears.

"They would call crews of men back to their plant to work nights and Sundays transferring poultry, already graded, from the export boxes, and substituting inferior poultry therefor, and the same would be then used in fulfilling the Government contracts; and at nights and Sundays these men would also be assigned jobs of changing Government stamped numbers, labels and dates.

"It is apparent, in this case, that the defendant Friedman would corrupt anyone he could—and he did corrupt a large number of people. The inspectors and the enlisted military personnel were not corrupted."

—o—

ARGUMENT

That said statements were furnished by the probation officer to the court prior to sentence and were examined by the court prior to sentence and were referred to by the court in the sentence and based on said pre-sentence investigation, the court determined the character of the petitioners and the severity of the sentence to be imposed or contrary to Section (1) of Division (c) of Rule 32 of the Federal Rules of Criminal Procedure.

That all of said allegations being false, the petitioners if they had known of said false and malicious allega

tions prior to sentence, would not have plead guilty as they were entirely innocent of every allegation referred to by the court at the time of sentencing and as contained in the pre-sentence investigation made by the court's probation officer.

When these petitioners entered their plea of guilty they were under a misapprehension and misunderstanding of the nature of their plea as they were never given any opportunity to prepare for sentence or to answer the false and malicious report and findings of the probation officer.

That these petitioners feel that a rehearing should be had before the Supreme Court of the United States to call to the court's attention their misunderstanding as to the alleged severity of their crime because of the false information furnished the sentencing court by the probation officer.

The petitioners were firm in the belief at the time their plea of guilty was entered that they had committed no crime or at most had committed a minor technical violation and had no reason to believe that the above false and malicious information had been gathered by the probation officer and had been submitted to the sentencing court and that the court would immediately pronounce sentence against these petitioners based on such false information immediately upon the plea of guilty being entered, which information never should have been submitted to the court until after the plea of guilty had been entered and without these petitioners being given a chance to answer said accusations.

That prior to trial, the withdrawal of the petitioners' plea of not guilty and entering the plea of guilty and

the sentencing of the court, the petitioner had no knowledge of the matters contained in the statements and charges made against them in the investigation report to the court and hence no opportunity to refute or meet these charges until subsequent reconsideration of the matter on a motion for new trial.

That it was sought by the petitioners to refute these allegations in the pre-sentence report and to also offer evidence that the petitioners' only crime was a technical violation. This was denied by the court.

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STATEMENT OF FACT

As regards Ground 2 for this petition for rehearing, these petitioners do not feel that the reviewing court considered the prohibition under Section (1) of Division (c) of Rule 32 of the Federal Rules of Criminal Procedure which provides as follows:

> "The probation service of the court shall make a pre-sentence investigation and report to the court before the imposition of sentence on the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant had plead guilty or has been found guilty."

———o———

ARGUMENT

Said Section (1) of Division (c) of Rule 32 of the Federal Rules of Criminal Procedure was enacted not only for the protection of an accused to assure him that

he would appear before an unbiased tribunal, but also to protect the court itself in the event the defendant should plead not guilty so that the court would not be biased and prejudiced in conducting the trial of the accused and in the event a plea of guilty was entered to enable the court to make a thorough and impartial investigation prior to sentencing.

This Section (1) is mandatory in nature and was clearly violated by the sentencing court in having been furnished the pre-sentence investigation by the probation officer and being furnished the minutes of the testimony before the grand jury prior to the time that the court had any knowledge or belief as to what exactly the pleas of the petitioners would be.

Following the entry of their plea of guilty, the court immediately sentenced the petitioners without giving them an opportunity to be heard and passed said sentence and the severity thereof upon information furnished by the probation officer which information was prohibited to the court and was denied to the court under Rule 32 of the Federal Rules of Criminal Procedure.

In thus violating Rule 32 of the Federal Rules of Criminal Procedure the court thus divested itself of authority to pass sentence upon these Petitioners.

The court exceeded its authority in passing sentence and denied these petitioners due process of law in furnishing itself with the report of the probation officer which was entirely false and malicious and erroneous.

The court having violated Rule 32 of the Federal Rules of Criminal Procedure should have given these pe-

titioners an opportunity to answer said charges as set forth in the pre-sentence report of the probation officer.

In the brief of the United States in opposition to the petition for writ of certiorari the Solicitor General (page 16, footnote 6) stated: "On April 16, 1952, the judge was informed that the defendants intended to change their pleas which they subsequently did on April 22, 1952." This is entirely *dehors* the record. The only reference to such a date in the record is the ruling and order on motion filed May 19, 1952, by the petitioners (Record 170) as follows: "On or about April 16, 1952, the court was informed by the United States District Attorney that the defendants desired to withdraw their pleas of not guilty as to certain of the counts and to enter pleas of guilty as to certain of the counts." The record does not indicate that any hearing in the case at bar was had on April 16, 1952, nor does the record contain any indication that the United States District Attorney was ever informed prior to April 16, 1952, or even April 22, 1952, that the defendants were withdrawing their pleas of not guilty as to any of the counts or entering a plea of guilty. The conclusion is, the court in informing itself of the contents of the pre-sentence investigation report and consulting the limits of the grand jury, violated Rule 32 of the Federal Rules of Criminal Procedure. It is manifest that notwithstanding order the court might anticipate what happened on April 22, 1952, when the plea of guilty was entered, that the court had already become disqualified from proceeding further and that the cause should have been reassigned. In the instant case the pre-sentence investigation report had become, in fact, so far as the sentencing

court was concerned, a *pre trial* report and it is the contention of counsel here that the instant the court informed itself of the contents of this report and of the matters in the minutes of the grand jury, the person of the court became incompetent to proceed further, nor was this incompetency subsequently cured by a plea of guilty. It is not unreasonable to indulge in the presumption as to what the attitude of the court would have been if upon April 22, 1952, had the petitioners then and there appeared and declined to change their plea of not guilty. The court may have been well intentioned in the premises and in ordering the pre-sentence investigation report to be made and having available the minutes of the grand jury so that in the event there was a subsequent withdrawal of the plea of not guilty and an entry of a plea of guilty, the matter of sentencing the defendants could have been made with reasonable dispatch, but for the court to apprise itself of the contents of the report and the minutes of the grand jury while a plea of not guilty was still the plea of record and before any trial, was, it is reasonably urged, such an invitation to bias and prejudice as would be beyond the power of the person of any court to overcome.

It is well to note the reason for this rule (Rule 31, Section (1) Division (c), Federal Rules of Criminal Procedure) and counsel cites to the court the case of *U. S. vs. Christakos*, D. C., Ala. 1949, 83 F. Supp. 521, Affirmed 178 F. 2d 84; in which the court stated that the purpose of Subdivision (c), Section (1) of this rule prohibits disclosure to the court of pre-sentence investigation and report of probation service before the defendant has plead-

ed guilty or has been found guilty is *to insure that the judge will be an arbiter and not an arm of prosecution.*

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STATEMENT OF FACT

As regards Ground 3 for this petition for rehearing, the petitioners urge that no other conclusion can be reached from the record other than that the sentencing court at the instant the petitioners entered their pleas of guilty, the person of the court had fully determined that it was to inflict on the defendant, Ray E. Friedman, the maximum prison sentence and upon the defendant, American Produce Company, the maximum fine. That under the circumstances the court was duty bound in judicial fairness to your petitioners to incorporate into the court's warning (Record 34-35) and charge the petitioners as to the effect of their plea of guilty, not only of the "possibility" but of the probability and as was the case the "certainty" of the court to impose the maximum penalty.

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ARGUMENT

It is apparent from the record that the person of the court at the very moment of the entry of the plea of guilty, it had in its bosom all of the prejudicial matters that subsequently became part of the court's sentence. One cannot escape the conclusion that the court at the very time of the charge and warning to the defendants as to the meaning of their plea of guilty, then and there had fully resolved and determined to impose the maximum sentence. To permit a plea of guilty to stand under

such circumstances, your petitioner humbly contends, to permit a plea of guilty to stand to them and for the court to accept a plea of guilty with this resolve in mind was tantamount to at least an unintentional deception to induce the defendants to feel that the court might be lenient, based on the usual tendency of the court to give some consideration of leniency in imposing sentence on a defendant pleading guilty.

Much stress is give by Solicitor General to the presumption that the petitioner being a businessman of wide experience should have fully understood the significance of his plea of guilty especially after the warning and charge of the court. We submit, however, it is much more reasonable to presume that the petitioner having been advised by counsel to enter such a plea, therefore accepted the charge of the court as routine practice and that although no specific promises were made, he unquestionably was advised that the plea of guilty itself was mitigating and of such weight as would in all probability, insure the imposing of a sentence at least, in some degree, less than the maximum.

One cannot escape the import of the predicament of a defendant pleading guilty, standing before court, the person of which had accepted that plea, knowing full well the defendant by such a plea was availing himself of nothing less than the full measure of the law in all its rigor. We submit, could it in keeping with sound discretion, equity and fairness, and without prejudice to the defendant for the court knowing it was about to mete out the maximum prison sentence, accept such a plea, when a person of the preserved experience of a judge, he must

have known the defendant in his mind was reasonably expecting some measure of mercy. Was it not the court's duty to at least deal at arm's length with the defendant and advise him not only of the "possibility" of a maximum sentence, but of its certainty.

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PRAYER

Wherefore, these petitioners pray that the Supreme Court of the United States grant this petition for rehearing of their cause and reconsider not only the basis upon which the defendants entered their plea of guilty, but also the denial to these defendants of due process of law by the sentencing court having studied in advance prior to their entering of a plea of guilty of the presentence investigation by the probation officer and basing the court's sentence accordingly and that at final hearing these petitioners ask that they be granted a hearing before this court on their petition for writ of certiorari.

M. A. Miller,

Attorney for Petitioners.

Steele State Bank Bldg.,
Cherokee, Iowa.

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CERTIFICATE OF COUNSEL

I, Marvin A. Miller, an attorney in the practice of law in Cherokee, Cherokee County, Iowa, and being the attorney for the petitioners, Ray E. Friedman and the American Produce Company, Sioux City, Iowa, Cause

Number 618 before the Supreme Court of the United States, do hereby state and certify to the Supreme Court of the United States that the above and foregoing petition for rehearing is presented in good faith and not for the purpose of delay.

M. A. MILLER,

Attorney for Petitioners.

Steele State Bank Bldg.,
Cherokee, Iowa.